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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	**CS Docket No. 95-61**
Competition in the Market for the	)	
Delivery of Video Programming	)	

COMMENTS OF BELL ATLANTIC

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TABLE OF CONTENTS

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	)	
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I. Introduction and Summary

While some positive developments have occurred in the months since the Commission's 1994 Report to Congress on the status of competition in the video delivery market, such as the launch of new direct broadcast satellite services,[2] the incumbent cable industry remains the overwhelmingly dominant provider of multichannel video services to American homes.

These developments would pale in comparison, however, to the impact on cable competition that would result if telephone companies could finally overcome the regulatory barriers that impede their entry into the market either as video dialtone

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[1] For the purposes of this filing, the Bell Atlantic companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., and Bell Atlantic Video Services Company.

[2] DirecTV and USSB now offer about 175 channels of programming to over half a million subscribers, with projections for approximately 2 million subscribers by the end of 1995. "Digital TV: Advantage Hughes," Business Week (Mar. 13, 1995) at 66-68. A third DBS provider, PrimeStar has another 300,000 subscribers, and a fourth service, EchoStar, is seeking market entry. Id.

providers or cable operators. Unfortunately, rather than moving to eliminate those barriers, the Commission, over the last year, has instead imposed, or threatened to impose, additional redundant or unnecessary regulatory hurdles to telephone company entry into the video delivery market. As a result, many telephone companies are reassessing their video deployment plans. Some are abandoning the common carrier video dialtone model, choosing instead to deploy closed cable systems.[3] Others await the outcome of the Commission's pending rulemaking proceedings to assess the future viability of video dialtone.

The most important actions the Commission could take to encourage effective competition in the video delivery market in the coming year would be to (1) provide telephone companies with maximum flexibility to deploy video delivery systems that meet the demands and requirements of the market, (2) eliminate redundant or unnecessary regulatory requirements for video dialtone services, and (3) apply the same regulatory requirements that apply to telephone companies offering video transport service over integrated facilities to cable operators offering telephone and other non-cable services over integrated facilities.

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[3] Ameritech has chosen to deploy cable systems, reportedly in part out of concern that imposition of redundant regulatory requirements under both Title II and Title VI would make video dialtone economically unsustainable. Others, like Southwestern Bell, have announced plans to deploy cable systems in selected areas. See Application of Southwestern Bell Video Service, Inc., W-P-C 7088 (June 20, 1995); see also "Ameritech abandoned VDT approach," Communications Daily at 5 (June 28, 1995).

II. The Video Dialtone Regulatory Framework Increasingly Discourages Telephone Companies From Offering Common Carrier Video Delivery Services

The regulatory framework for video dialtone has always created substantial hurdles to telephone entry into the video delivery market. The Commission has broadly interpreted Section 214 of the Communications Act so as to require telcos to obtain a federal permit in myriad circumstances before constructing or upgrading facilities to be capable of carrying video signals. The 214 application process itself immediately disadvantages the telco and creates a windfall for the incumbent cable provider. That is because the telco is required to lay out in minute detail for the benefit of its cable competitors information concerning its business plans, proposed architecture, geographic deployment plans, anticipated costs and revenues, and other valuable and competitively sensitive information. Moreover, the 214 authorization process itself can take weeks, months or even years, during which the incumbent cable operators in the intended deployment area further entrench themselves by upgrading their networks, expanding their service offerings and otherwise taking steps to undercut any potential entry advantage its telco competitor might have. A tariff with cost-justified rates must then become effective, which could take up to another nine months. Meanwhile, each day that passes while the telco applicant waits to complete its running of the regulatory gauntlet deprives consumers in the intended service area of the benefits of choice and competition among video providers.

In the last year, however, the Commission has added still further restrictions and burdens on this new service that will impede its ability to compete. Within the last twelve months alone, the Commission or its Staff have:

- Added a third sequential step in the approval process by requiring that telcos obtain a Part 69 waiver for their proposed video dialtone rate elements;[4]
- Required telephone companies to disclose increasingly detailed and competitively sensitive data concerning their business plans in Section 214 applications;[5]
- Proposed costly and burdensome video dialtone-specific accounting records that are incompatible with the Commission's existing cost accounting rules;[6]
- Issued video dialtone specific-tariff cost requirements that require disclosure of still further competitively sensitive information; and
- Issued Section 214 authorization orders that prohibit affiliated programmers from purchasing tariffed service over commercial video dialtone networks[7] despite unanimous judicial decisions holding such prohibitions unconstitutional and enjoining their enforcement.[8]

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[4] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-62.58, 10 FCC Rcd 244, ¶ 197; "Bureau Establishes Procedures for Tariff Filings and Part 69 Rate Structure Waiver Requests for LEC Video Dialtone Market Trials" at 2, DA 95-211 (rel. Feb. 10, 1995).

[5] "Common Carrier Bureau Provides Guidance on Video Dialtone Applications," Report No. CC 95-18 (rel. Mar. 10, 1995).

[6] RAO Letter 25, DA 95-703 (rel. Apr. 3, 1995).

[7] Application of New Jersey Bell Tel. Co., 9 FCC Rcd 3677, ¶72(f) (1994). Bell Atlantic's petition for reconsideration of that order, which was filed 22 months ago, is still pending despite the 90-day statutory mandate for action of such petitions, 47 U.S.C. § 405(b)(1), and despite the Commission's announcement that it would no longer enforce the cross-ownership restriction against Bell Atlantic and others, see NOI at ¶ 49.

[8] Order, Chesapeake and Potomac Tel. Co. v. United States, No. 92-1751-A (E.D.Va. Aug. 24, 1993); see also NOI at ¶ 48.

In addition, the Commission has initiated additional proceedings that could result in imposition of other burdensome, anticompetitive or economically harmful requirements, such as:

- Requiring compliance by the video dialtone platform provider or its affiliated programmer with both Title II and Title VI requirements (including both local franchise and Section 214 requirements), while cable is regulated only under Title VI;
- Setting arbitrary limits on the amount of capacity that could be used by an affiliated programmer;
- Including video dialtone, which is clearly a competitive service, under price cap regulation;
- Prohibiting arrangements to share limited analog capacity on video dialtone systems; and
- Prohibiting voluntary arrangements to provide video dialtone transport at preferential rates or without charge for programmers eligible for "must carry" on cable systems and for PEG programmers.

The Commission's vision of a flourishing common carrier video delivery industry can only be realized if the regulatory framework makes deployment of such systems a prudent business decision for telcos. As the telephone industry has repeatedly explained, however, continuing to impose asymmetrical and redundant regulatory burdens not borne by competitors, and the lack of pricing flexibility to respond to market requirements, may eventually force telephone companies to deploy closed cable systems, as some have recently chosen to do.[9]

III. The Commission Should Eliminate Regulatory Barriers to Deployment of VDT Systems

In its Notice of Inquiry, the Commission asked commenters to identify regulatory impediments to competitive entry in markets

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[9] See note 3 supra.

for the delivery of multichannel video programming, and actions the Commission should take to reduce or eliminate those barriers or otherwise foster competition in the video market.[10]

The Commission should expeditiously resolve the remaining regulatory issues in pending video dialtone proceedings so as to make common carrier video dialtone platforms an economically viable and attractive competitor to cable.[11] First, the Commission should clarify that telephone companies have the flexibility to provide either closed cable service subject to all of the same regulatory requirements as cable operators under Title VI of the Communications Act, or video dialtone service subject only to regulation under Title II of the Act.[12] Like any other business in a competitive market, telephone companies must be permitted to

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[10] NOI ¶¶ 69(c), 71(e) and (f), 73(f), 94 and 96. With regard to technological challenges to deployment of competing video services, Bell Atlantic urges the Commission to refrain from attempting to set standards, or to mandate particular features or functionalities. Market forces, customer requirements, and industry standard-setting bodies will solve these challenges in market responsive ways if left to their own devices, as was the case with development of SONET technology.

[11] The Notice of Inquiry specifically urges parties not to repeat arguments contained in other pleadings previously filed with the Commission. NOI ¶ 52. The citations at the end of each of the following statements therefore identify the previous pleadings that provide a fuller explanation of the legal and policy bases for the positions advocated by Bell Atlantic with regard to these pending rulemaking proceedings.

[12] See Comments of Bell Atlantic on the Fourth Further Notice at 7-11, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (Mar. 21, 1995); Reply of Bell Atlantic on the Fourth Further Notice at 2-5, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (April 11, 1995).

provide the services that the market demands and will support, or they will not be able to compete.

In order to ensure that telephone companies' competitors in the video market do not have artificial advantages created by regulatory fiat, neither the telephone company nor any affiliated programmer should be subject to duplicative regulation under both Title II and Title VI.[13] In particular, no franchise should be required for, and no additional Title VI regulations imposed on, this common carrier service. The Commission should also clarify that affiliated programmers may purchase tariffed service from telephone companies on any VDT system authorized by the Commission to date or in the future, under the same, nondiscriminatory terms and conditions as other programmers, without a franchise or any other additional regulatory burdens.[14]

Second, the Commission should refuse to set limits on the amount of capacity any single programmer, particularly an affiliated programmer, may lease on a video dialtone network, provided that initial system capacity has been allotted among all

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[13] See Comments of Bell Atlantic on the Fourth Further Notice at 15-21, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (Mar. 21, 1995); Reply of Bell Atlantic on the Fourth Further Notice at 5-11, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (Apr. 11, 1995).

[14] See Comments of Bell Atlantic on the Fourth Further Notice at 19-20, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (Mar. 21, 1995).

potential customers pursuant to an open, nondiscriminatory process.[15] Forcing telcos to build excess capacity and then requiring them to let significant portions of that capacity lie fallow, despite existing demand for that capacity, on the off chance that some other programmer will want to purchase some of the capacity at a later date would be economically wasteful, undercut the financial viability of video dialtone networks, reduce the services available to consumers, and be an unconstitutional "taking" of private property under the Fifth Amendment.[16]

Third, the Commission should remove video dialtone service from price cap regulation, giving video dialtone carriers price flexibility to respond to market forces.[17] It should also revise the Accounting and Audit Division's requirement for creation of burdensome and unnecessary video dialtone-specific subsidiary

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[15] For example, Bell Atlantic conducted an open enrollment process to allocate initial capacity on its Dover, New Jersey video dialtone system that permitted all customers to reserve capacity in advance of service and provided for proportional allocation in the event of oversubscription. See Bell Atlantic Tariff F.C.C. No. 10, Transmittal No. 741 (Jan. 27, 1995).

[16] See Comments of Bell Atlantic on the Fourth Further Notice at 11-14, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (Mar. 21, 1995); Reply of Bell Atlantic on the Fourth Further Notice at 11-12, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (Apr. 11, 1995); Comments of Bell Atlantic on Petitions for Reconsideration and Clarification of Video Dialtone Reconsideration Order at 3-6, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (Feb. 9, 1995).

[17] See Comments of Bell Atlantic at 2-5, Price Cap Performance Review of Local Exchange Carriers Treatment of Video Dialtone Services Under Price Cap Regulation, CC 94-1 (Apr. 17, 1995).

accounting records, which are incompatible with existing Commission-mandated cost accounting processes.[18]

Fourth, the Commission should authorize appropriate channel sharing arrangements that permit recovery of the costs of such sharing arrangements even in networks that lack interdiction capability;[19] and authorize voluntary preferential access arrangements in the public interest, such as Bell Atlantic's "will carry" proposal.[20]

Fifth, the Commission should authorize joint ventures between telephone companies and cable companies in any community for the purpose of constructing, operating and maintaining distribution facilities for provision of voice, video or data services, provided that both the telco and cable company separately offer competing services over that jointly owned facility.

The Commission should also initiate further rulemakings to remove additional regulatory barriers to video dialtone's

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[18] See Accounting and Reporting Requirements for Video Dialtone Service, RAO Letter 25, DA 95-703, AAD 95-68, Reply Comments of Bell Atlantic at 1-6 (June 9, 1995).

[19] See Comments of Bell Atlantic on Third Further Notice of Proposed Rulemaking at 11-13, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (Dec. 16, 1994); Reply of Bell Atlantic Concerning Third Further Notice of Proposed Rulemaking at 11-13, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (Jan. 17, 1995).

[20] See Comments of Bell Atlantic on Third Further Notice of Proposed Rulemaking at 8-11 and Exhibit A, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (Dec. 16, 1994); Reply of Bell Atlantic Concerning Third Further Notice of Proposed Rulemaking at 9-16, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC 87-266 (Jan. 17, 1995).

ability to compete with cable. The Commission should eliminate its Section 214 application process and simplify tariff requirements for provision of video delivery services by telephone companies who have zero share of this competitive market. If, however, the Commission believes that it must continue to intrusively regulate this fledgling industry through preauthorization requirements and price regulation, it should collapse its current three-step regulatory approval process into a single proceeding with a 90-day time limit.[21] The three steps are largely redundant, because many of the same issues are examined over and over again in the 214, Part 69 and tariff proceedings. Moreover, a streamlined approval process with a date certain for resolution would facilitate business planning by telephone companies and their programmer-customers, decrease opportunities for regulatory gamesmanship by competitors, and further administrative efficiency for the Commission and its staff.

In order to ensure that market forces, not regulatory fiat, determine the outcome of competition between the cable and telephone industries in providing similar services, the Commission should also apply the same rules to cable operators entering the telephone business that already apply to telephone companies entering the video business. While Bell Atlantic believes that many of the existing regulations applicable to telephone companies are unduly burdensome, unnecessary and anticompetitive, to the

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[21] See Letter from Raymond W. Smith, Bell Atlantic, to Reed Hundt, Chairman, FCC (March 7, 1995).

extent that such rules continue to apply to telephone companies they should also apply to cable companies offering similar services. Specifically, the Commission should require cable operators providing telephone or other non-cable services over integrated facilities to comply with the cost allocation, accounting, affiliate transaction, Section 214, Open Network Architecture, pricing and other requirements applicable to telephone companies.

Finally, the Commission should promptly initiate a further rulemaking to amend, or act on pending petitions to reconsider,[22] its inside wiring rules for cable. For reasons explained at length in other proceedings,[23] the current rules, which place the rate demarcation point at what is often a physically inaccessible location, effectively prevent consumers in multidwelling units ("MDUs") from switching video delivery providers because of the expense and physical damage that may result. Such a rulemaking proceeding should also prohibit cable operators from entering into long-term exclusive contracts with MDU building owners to provide cable service. Such exclusive contracts deprive tenants of the right to choose competing video services,

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[22] Comments of Bell Atlantic, Joint Petition for Rulemaking to Establish Rules for Subscriber Access to Cable Home Wiring for the Delivery of Competing and Complimentary Video Services, RM-8380 (Dec. 21, 1993).

[23] See Ex Parte Letters from Liberty Cable Co., Inc., to William F. Caton, Secretary, FCC MM 92-260 (Nov. 14, 1994); Boyer Taylor, Camden Development, Inc. to Reed E. Hundt, Chairman, FCC (Jan. 30, 1995); and Howard Ruby, GE Capital-ResCom, to Reed E. Hundt, Chairman, FCC (Jan. 27, 1995).

and deny alternative providers the opportunity to compete for their business.

IV. Bell Atlantic's Video Delivery Plans Have Been Affected by Events Since the 1994 Competition Report

Since the Commission's 1994 Competition Report, several developments have affected Bell Atlantic's video delivery plans.

In October 1994, Bell Atlantic, Nynex and Pacific Telesis Group formed a joint venture, now named Tele-TV, to produce content and develop technical systems for the three partners' interactive video networks. This partnership serves the public interest by permitting the participating telcos to pool their resources to create new programming offerings under the Tele-TV brand, obtain rights to existing programming at competitive rates, and negotiate delivery of hardware and software from vendors in larger quantities at lower rates. Such joint activities benefit consumers by providing new programming offerings and packages from which to choose, and by permitting these new market entrants to provide service offerings that are cost competitive with existing providers.

Earlier this year, Bell Atlantic and Nynex also announced that they would collectively invest up to $100 million in an MMDS wireless cable company, CAI Wireless Systems, Inc. In addition, an agreement entered into between the parties would allow Bell Atlantic the option to lease capacity on certain of CAI's wireless transmission systems to provide and market video programming

services to subscribers.[24] This investment is strongly in the public interest since it will provide CAI with capital to assemble and operate wireless cable licenses and to upgrade its systems to add digital capabilities that will significantly expand their capacity. Likewise, the option to use CAI's systems to deliver video programming services will allow Bell Atlantic to deliver competing video services to the marketplace more quickly than would otherwise be possible. In both respects, consumers will be the ultimate beneficiaries of the increased competition that results. The public interest is also served when new market entrants, such as Bell Atlantic and Nynex, have the flexibility to use whatever technology or mix of technologies allows them to quickly enter the market and compete most effectively with established providers. This is especially true given that incumbent cable operators already provide both wireline and wireless video programming services in the same areas as a result of their ownership interests in Primestar's direct broadcast satellite service.

Finally, in May 1995, Bell Atlantic withdrew two pending Section 214 applications for authorization to deploy hybrid fiber-coaxial cable video dialtone systems in six major market areas, and to deploy a commercial Asymmetric Digital Subscriber Line-based

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[24] Bell Atlantic anticipates that advances in digital transmission and compression technology will allow wireless cable systems to deliver more than 100 channels of video programming to subscribers by 1996.

video dialtone service in the Washington, D.C. metropolitan area.[25] As Bell Atlantic explained, technological developments that occurred during the pendency of the authorization process forced it to reassess the technology and architecture to be used for large-scale deployment of these systems.[26] Bell Atlantic is currently in negotiations with equipment vendors for deployment of switched digital video systems that would permit delivery of voice, video and data signals over integrated facilities. Upon completion of those negotiations and other business planning to reflect our new deployment plans, Bell Atlantic will file new Section 214 applications with the Commission, if required to do so.[27]

V. Programmers Offering Multichannel Video Programming Over Video Dialtone Systems are Entitled to the Benefits of the Program Access Rules

The Commission has also sought comments concerning whether the 1992 Cable Act's program access rules run to the

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[25] Application of Bell Atlantic Tel. Cos., W-P-C 6966 (filed June 16, 1994) and Application of the Chesapeake and Potomac Tel. Cos. of Maryland and Virginia, W-P-C 6912 (filed Dec. 16, 1993).

[26] See Letter from Edward D. Young, III, Bell Atlantic to Kathleen Wallman, FCC (May 24, 1995).

[27] The NOI also seeks information on the results obtained from any VDT market trial for which reports have been filed with the Commission. NOI ¶ 51. Bell Atlantic's first report on its VDT market trial in Northern Virginia is due on October 17, 1995. The Commission also asked for information on the status of the build-out of systems for which Section 214 authorizations have been granted. NOI ¶ 53(c). Bell Atlantic plans to make video dialtone service available to approximately 2,000 of the 38,000 households in Dover Township, New Jersey, later this summer, and expects to add approximately 1,500 additional households to the Dover Township VDT network in each subsequent month.

benefit of video programmers offering video services over video dialtone platforms.[28]

Section 19 of the 1992 Cable Act prohibits cable operators, satellite broadcast programming vendors, and vertically integrated satellite cable programming vendors from depriving any multichannel video programming distributor ("MVPD") of access to programming by unfair, deceptive or anticompetitive behavior. Pursuant to the Commission's rules, a "multichannel video programming distributor" means "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming."[29] The definition is not restricted in its application to entities who make such programming available over any particular transmission medium. Video programmers offering multiple channels of video programming over video dialtone systems, therefore, fit squarely within the definition of an MVPD.[30] In fact, in every other context in which the issue has been raised, the Commission has concluded that video programmers offering multiple channels of programming over video dialtone systems are MVPDs within the meaning of that definition.[31]

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[28] NOI ¶ 90(g).

[29] 47 C.F.R. § 76.1000(e).

[30] Although video dialtone programmers are not specifically identified as included in the definition of an MVPD, id., the rule states that entities that qualify as MVPDs "include, but are not limited to" the entities so listed.

[31] See Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992: Equal Employment Opportunity, MM Docket NO. 92-261, Report and Order (July 23, 1993), ¶¶ 45-46 (EEO rules); Implementation of the Cable Television

There can be no question, therefore, that video programmers offering more than one channel of video programming over a video dialtone system are entitled to the benefit of the program access rules.[32]

Conclusion

The Commission's 1995 Report to Congress should identify the regulatory impediments to rapid, cost effective deployment of video dialtone systems as competitors to cable, and the Commission should move expeditiously to eliminate those market entry barriers.

Respectfully submitted,

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Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues, MM Docket No. 92-259, Report and Order (Mar. 29, 1993), ¶ 136 (retransmission consent); Implementation of Sections of the Cable Television consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking (May 3, 1993).

[32] Nonetheless, one provider of cable programming has already informed Bell Atlantic's video affiliate that it believes that it is not obligated to, and may not, make its programming available to the affiliate. Any such refusal would be a direct violation of the statute and the Commission's rules.